IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED
JUN 2 2014
David J. Bradley, Clerk of Court

UNITED STATES OF AMERICA, Plaintiff - Respondent.	)	
	)	Criminal Case No. H-99-455-02
VS.	)	Civil Case No. ____________
JORGE LUIS GARZA, Defendant - Petitioner.	)	

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION UNDER 28 U.S.C. 2255(f)(3) AND OR 28 U.S.C. §1651 AUDITA QUERELA IN LIGHT OF ALLEYNE V. UNITED STATES, 133 S.Ct. 2151 (2013)

COMES now the petitioner JORGE LUIS GARZA proceeding in pro se and respectfully submits his Memorandum of Law in Support of his 28 U.S.C. §2255(f)(3) and or 28 U.S.C. §1651 Audita Querela in light of the Supreme Court's holding in Alleyne v. United States, 133 S.Ct. 2151 (2013), regarding **ELEMENTS** of the offense that have to be decided by a jury under the beyond a reasonable doubt standard as opposed to sentencing factors.

The instant "Memorandum" of law is an attempt demonstrate to the Court the "distinction" of petitioner's Sixth Amendment argument as to the substantive application of the beyond a reasonable doubt component of Alleyne through In re Winship, 397 U.S. 358, 363 (1970). as opposed to Alleyne's extension of United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428. 153 L.Ed.2d 556 (2002); and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d (2000), as decided by the United States Circuit Court of Appeals for the Fifth Circuit at In re Alta Kemper, 755 F.3d 211 (2013)(disclaiming retroactive application for all authorities presented by the movant including Alleyne v. United States). It should be noted that at no time was the Fifth Circuit confronted with the "beyond a reasonable doubt component" and Sixth Amendment for the jury to decide all **ELEMENTS** of the offense that would establish a violation of law to allow for the sentencing court to impose even a minimum term of punishment.

Petitioner is in total agreement with the Fifth Circuit's findings not to apply retroactivity to mere sentencing factors on collateral review. Such an argument in opposition to the established body of law would be no more than "beating a dead horse", as well as diluting all colorful argument for the exception to Tyler v. Cain, 533 U.S. 656, 662-663, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001)(stating only the Supreme Court can render a new rule retroactively applicable to case that are on collateral review).

The Fifth Circuit utilized all the "sentencing factor" decisions regarding non-retroactivity in In re Alta Kemper. Petitioner cites numerous Supreme Court decisions as to the "beyond a reasonable doubt component of Alleyne firmly established in In re Winship, 397 U.S. 358, 363 (1970), fully retroactive under Ivan V. v. City of New York, 407 U.S. 203, 205 (1972); Hankerson v. North Carolina, 432 U.S. 233, 243 (1977), all three mandatory authorities of law that have never been presented or decided via the Apprendi Court and other opinions regarding "sentencing factors", not **ELEMENTS OF THE OFFENSE.**

The petitioner believes the only element as to specific drug quantity contained in the indictment is limited to five kilograms for the jury to decide beyond a reasonable doubt. The term "or more" is so ambiguous that it removes the presumption of innocence and takes away from the Sixth Amendment guarantee to have all the elements of the offense decided by a jury under the standards for a criminal trial. The lesser preponderance of the evidence standard would only be applicable in a civil proceeding. In re Alta Kemper, 755 F.3d 211 (5th. Cir. 2013), does not dilute petitioner's rights under the Sixth Amendment through Alleyne and In re Winship. Nor does the extension of Apprendi through In re Alta Kemper foreclose the substantive retroactive application of Alleyne through Ivan V. v. City of New York, 407 U.S. 203, 205 (1972); Hankerson v. North Carolina, 432 U.S. 233, 243 (1977).

For the above stated facts, the petitioner respectfully asks the Honorable Court to consider the arguments presented as supported by the authorities cited to preserve petitioner's Alleyne claim under 28 U.S.C.§2255(f)(3) & or 28 U.S.C. §1651 Audita Querela as mandated through Dodd v. United State, 545 353 (2005).

Respectfully submitted

DATED: May 23, 2014
Adelanto, Ca.

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